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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The Refugee Act of 1980 defines a "refugee" as a person who has "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1988). The question presented is whether a person who fled his native country after refusing for political reasons to join a guerrilla organization, who fears that he will suffer persecution on account of that refusal if he returns home, and whose fear of persecution is concededly well-founded, has established that he is a "refugee" within the meaning of the statute, or whether he must also adduce state of mind evidence proving that the persecutors' disagreement with his opinion would in fact be the cause of the persecution.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE GOVERNMENT'S INTERPRETATION OF THE REFUGEE DEFINITION IS CONTRARY TO CONGRESSIONAL INTENT	8
A. Elias-Zacarias' Fear of Persecution on Account of Political Opinion Is Well Founded	8
B. The Position Advanced by the Government Would Require Applicants To Sustain Impossible Burdens of Proof	12
II. THE GOVERNMENT'S INTERPRETATION OF THE STATUTORY LANGUAGE IS NOT ENTITLED TO DEFERENCE	20
A. The BIA Has Not Consistently Required Applicants To Prove the Specific Motivations of Their Persecutors	21
B. The BIA Has Inferred the "Political Opinion" Element Without State of Mind Proof in Cases Involving Forced Recruitment by Groups Other Than Legitimate Governments	22
III. IF THE COURT ENUNCIATES A NEW EVIDENTIARY STANDARD, THE CASE MUST BE REMANDED FOR FURTHER FACTUAL DEVELOPMENT	26
CONCLUSION	33

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American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) 26
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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1342

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Jairo Jonathan Elias-Zacarias fled his native Guatemala in 1987 in fear of persecution by armed anti-government guerrillas who had tried to pressure him into joining them. He seeks recognition that he is a refugee within the statutory definition set forth in the Refugee Act of 1980. The United States government now concedes that Elias-Zacarias has a well-founded fear of persecution, but insists that he has failed to prove that such persecution would be "on account of . . . political opinion."

One evening in late January 1987, Elias-Zacarias' parents observed two masked men with machine guns lurking

in the semi-darkness outside their home in Olintepeque, Guatemala.[1] The armed men approached the house, identified themselves as members of the anti-government guerrillas, and attempted to pressure Elias-Zacarias and his family into joining their revolutionary movement. They insisted that "the guerrillas were good," but Elias-Zacarias and his family stated repeatedly that they did not want to join the guerrillas. The armed intruders left, stating that they would return and warning Elias-Zacarias' family to "think it [over] well." Opp. Cert. App. at 4a-7a.

Elias-Zacarias did not want to align himself against the legitimately constituted government of Guatemala—in his own words, to go "against the government," but he believed that the guerrillas would "take me and kill me" if he continued his refusal to join them when they returned. Opp. Cert. App. at 5a.[2] Therefore, following his parents' advice, he fled Guatemala in March 1987. On or about July 12, 1987, he entered the United States near Nogales, Arizona. Agents of the Immigration and Naturalization Service (INS) apprehended him the same day, placed him in detention, and commenced proceedings to deport him.

At the deportation hearing, the INS argued that Elias-Zacarias had failed to establish a "well-founded fear of persecution" because he and his family had not been threatened by the guerrillas and the guerrillas had not returned to his family's home. *Id.* at 13a. The immigration judge found Elias-Zacarias to be a credible witness and believed his testimony concerning his reasons for leaving Guatemala. She concluded, however, that he had not established that he qualified as a refugee. She suggested that he had not shown that his experience with the guerrillas was "any different from that experienced by other Guatemalans." Appendix to Petition for a Writ of Certiorari at 41a (hereinafter cited as "Pet. App."). Moreover, she found that, since there was (at that time) no evidence that the guerrillas had actually returned to his parents' home, Elias-Zacarias had "failed to show that if he is returned to Guatemala the guerrillas will seek him out." *Id.* at 42a.[3]

The Board of Immigration Appeals (BIA) dismissed Elias-Zacarias' appeal on procedural grounds. Elias-Zacarias moved to reopen, lodging with the BIA *inter alia* a letter from his father. The letter stated that the guerrillas had returned to the family's home on at least two occasions looking for Elias-Zacarias. The letter (addressed to Elias-Zacarias' attorney) went on to state:

> In spite of the fact that [the guerrillas] are looking for him and the truth is that my son does not know that they are looking for him here at the house, we have not told him anything about this in order that he not worry about us or think they can kill us and even though we would tell him about it we would not solve anything . . . .[4]

---

[1] Elias-Zacarias' uncontradicted testimony before the immigration judge is reprinted as an appendix to Respondent's Brief in Opposition to the Petition for Writ of Certiorari (hereinafter cited as "Opp. Cert. App.").

[2] At the deportation hearing, Elias-Zacarias' counsel asked him to testify further about what he thought would happen to him if the guerrillas returned and found him. Counsel for the INS objected to the question as speculative, and the immigration judge sustained the objection. Opp. Cert. App. at 6a.

[3] The immigration judge's only mention of the five statutory grounds for persecution occurred in the two sentences stating her legal conclusions that Elias-Zacarias had failed to prove that he was a refugee eligible for asylum or was entitled to withholding of deportation. Pet. App. at 41a-42a.

[4] Petitioner's Opening Brief at 11, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991) (citing Administrative Record 38). The court of appeals' decision did not rely on the letter from Elias-Zacarias' father; it found that the original record was sufficient to establish Elias-Zacarias' eligibility as a refugee.

The BIA denied Elias-Zacarias' motion to reopen but addressed the merits of his appeal. It stated that there was no evidence that Guatemalan guerrillas generally engaged in forced recruitment and (even considering the father's letter) that Elias-Zacarias had failed to establish an objective basis for his fears that the guerrillas would return and kidnap or kill him. The BIA concluded that Elias-Zacarias had shown only that he had been approached and asked to join the guerrillas—not that threats were directed towards him.[5]

Elias-Zacarias appealed to the United States Court of Appeals for the Ninth Circuit. Defending the BIA's decision, the government argued that the BIA had applied the Ninth Circuit's precedents and had found no threats by the guerrillas against Elias-Zacarias.[6] The court of appeals found that the BIA had erred in its conclusion that the Guatemalan guerrillas did not engage in forced recruitment. The panel determined that the State Department's advisory letter on Elias-Zacarias' application, taken together with Elias-Zacarias' application for asylum and hearing testimony, established that the Guatemalan guerrillas did engage in forced recruitment. Focusing on the exhortation to "think it [over] well" by

[5] Pet. App. at 32a-33a. The BIA did not address the question the government presents here: whether forced recruitment by a guerrilla army constitutes persecution "on account of political opinion." Rather than raise the "political opinion" issue, the BIA focused on the question whether there was a threat and sought to distinguish the decision in *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988), on the ground that "the alien there was actually threatened by the guerrillas for his refusal to join them." The BIA decision cited prior BIA cases involving guerrilla organizations in support of its conclusion that the attempt by the guerrillas to recruit Elias-Zacarias was not forcible. Pet. App. at 32a-33a.

[6] Brief for Respondent at 2, 11, 17, 28, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

men carrying machine guns and wearing masks,[7] the court of appeals also credited Elias-Zacarias' belief that the guerrillas had threatened him. Pet. App. at 16a.

Although the questions presented to the court of appeals did not address the "on account of political opinion" language at issue in this Court, the court of appeals reasoned that, in general, "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and . . . the persecutors' motive in carrying out the kidnapping is political." Pet. App. at 12a. The court relied on circuit precedents holding that forced recruitment by a guerrilla organization can provide a basis for persecution on account of political opinion. *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984). The court observed that the INS had not presented evidence of any non-political motive for the guerrillas' threats. Pet. App. at 18a. Applying the "well-founded fear" test adopted by this Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-41 (1987), the panel then held unanimously that Elias-Zacarias had indeed established that he qualified as a refugee.

The government filed a petition for rehearing, arguing for the first time that forced recruitment by a guerrilla organization does not necessarily constitute persecution "on account of political opinion" and that Elias-Zacarias had the burden of proving his persecutors' state of mind.[8]

[7] The panel took note of the fact that, at oral argument, "the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but 'because it might have been dusty that day.'" Pet. App. at 17a n.8.

[8] *Compare* Pet. App. at 13a (INS position at deportation hearing) *and* Brief for Respondent at 11, 17, 28, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991), *with* Respondent's Petition for Rehearing With Suggestion for Rehearing En Banc at 1, 4, 9, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

The panel denied the motion but amended its prior opinion in minor respects.[9]

SUMMARY OF ARGUMENT

This case is not about displaced persons fleeing from general conditions of civil strife in a war-torn country. This is a case about one individual—Jairo Jonathan Elias-Zacarias—who had a political opinion, who acted on it, and who fears that if he returns home he will be taken and killed because of his politically-motivated act. The immigration judge believed and the record establishes that Elias-Zacarias refused to join the guerrillas because he did not wish to align himself "against the government," and that he has a genuine fear of persecution because of his refusal. Giving the words of the statute their ordinary meaning, the record as a whole is sufficient to establish that Elias-Zacarias' fear of persecution on account of political opinion is well founded and thus that his case falls within the statutory definition of "refugee."

The government insists, however, that Elias-Zacarias has the burden of proving more than that he has a political opinion and a well-founded fear of persecution. The government asserts that the "typical case" of forced conscription by guerrillas does not involve persecution on account of political opinion, Petitioner's Brief at 27 (hereinafter cited as "Pet. Br."), even though the record contains absolutely no factual basis for such a presumption. To overcome this presumption, the government would require Elias-Zacarias to prove the state of mind of his persecutors—to prove that the persecution he fears would actually be motivated by the guerrillas' desire to punish him for his political opinions. This constricted reading

[9] The amended opinion elaborated on the meaning of the "reasonable possibility" standard for establishing a "well-founded fear of persecution," and substituted the word "inference" for "presumption" in its discussion of the guerrillas' motives. Pet. App. at 2a-5a; *see id.* at 18a.

of the statute would make it nearly impossible for applicants like Elias-Zacarias to qualify as refugees. Congress did not intend to impose such an unreasonable burden. As this Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), the statute focuses on the state of mind of the refugee, requiring him only to show that *he fears* persecution by reason of one of the five enumerated grounds and that *his fear* is "well-founded." The Refugee Act of 1980 was intended to implement the 1967 U.N. Protocol, which does not require an applicant to adduce specific evidence of the subjective motivations of the persecutors he fears.

The government's position is flatly inconsistent with a number of prior decisions of the BIA. The BIA has held that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988); *Matter of Ahmed*, BIA unpublished dec. No. A24 798 181 (decided June 10, 1988).[10] In a number of cases decided both before and after Elias-Zacarias' case, the BIA has held that forced recruitment into the Soviet-controlled Afghan army was "persecution on account of political opinion"—without any evidence about the subjective motives of the persecutors. If the BIA had followed these cases, it would have concluded that Elias-Zacarias is a refugee within the meaning of the statute. The agency's unexplained inconsistency deprives its interpretation of any claim to heightened judicial deference.

Finally, even if the Court were to accept the statutory interpretation the government now urges, it should not uphold the BIA's decision against Elias-Zacarias. The rationale of the BIA decision was that Elias-Zacarias had not shown a sufficient likelihood of persecution upon his return to Guatemala. The court of appeals rejected that

[10] Respondent has lodged with the Clerk of this Court copies of all of the unpublished BIA decisions cited in this brief.

rationale, and the government did not ask this Court to review that portion of the court of appeals' decision. The question the government does raise here—the interpretation of the phrase "well-founded fear of persecution on account of political opinion"—was not litigated before the immigration judge, the BIA, or the court of appeals prior to the rehearing stage. Elias-Zacarias has not had a fair opportunity to develop a factual record regarding the subjective motivations of his persecutors, or to demonstrate the unreasonableness of the burden of proof the government now seeks to impose on him. Accordingly, if this Court should adopt an interpretation which turns on proof of the persecutors' motives, it should remand the case with instructions to permit Elias-Zacarias to submit further evidence.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF THE REFUGEE DEFINITION IS CONTRARY TO CONGRESSIONAL INTENT.

A. Elias-Zacarias' Fear of Persecution on Account of Political Opinion Is Well Founded.

Elias-Zacarias fears that if he returns to Guatemala he will suffer persecution on account of his politically motivated refusal to join the guerrillas. The Refugee Act of 1980 defines "refugee" as one who is outside the country of his nationality and who is unable or unwilling to return "because of persecution or a well-founded fear of persecution on account of . . . political opinion." Elias-Zacarias submits that he fits within that definition and rests his claim, not only on what happened in Guatemala in 1987, but also on what he fears will happen to him if he returns home.[11] He relies on the "ordinary and ob-

[11] The very question presented in the government's brief thus starts everyone off on the wrong foot because it ignores the fear component of the question that is presented by the statute and by the facts.

vious meaning" of the statutory language. *Cardoza-Fonseca*, 480 U.S. at 431.

The government's central reason for opposing Elias-Zacarias' claim is that Elias-Zacarias did not adduce evidence of the state of mind of the persecutors he fears. The government argues that "[t]he persecutor's state of mind is determinative." Pet. Br. at 9. In its "ordinary and obvious" meaning, however, the definitional language of the Refugee Act of 1980 directs inquiry not to the persecutor's state of mind, but to the *applicant's* state of mind, and to the nature and basis of the applicant's subjective fear: Does the applicant fear persecution on account of his political opinion? If so, is that fear objectively reasonable?

The record of this case answers those questions in the affirmative. Elias-Zacarias' subjective fear of persecution is established by his unchallenged testimony that he feared that the guerrillas would retaliate against him for his refusal to join them—in his words, that they would "take me and kill me." Opp. Cert. App. at 5a. The immigration judge believed that testimony, as she believed Elias-Zacarias' testimony that he refused to join the guerrillas because he did not wish to align himself "against the government."[12] Elias-Zacarias did not refuse to join because he was afraid of gunfire, because he wished to stay in the village to protect his aged mother, or because he preferred his current employment. "By . . . refusing to join a particular political faction, [he]

[12] The government's fondness for dictionary definitions, Pet. Br. at 13, is selective. The assertion that "[t]he certified administrative record does not reveal that respondent has any political opinions at all, let alone a political opinion offensive to the guerrillas," Pet. Br. at 29, acknowledges neither this testimony nor *Webster's Ninth New Collegiate Dictionary* (1988), which defines "political" as meaning either "of or relating to government, a government, or the conduct of government," or "involving or charged or concerned with acts against a government or a political system." *Id.* at 910-11.

expressed his opinion and took a political stance. That conduct is as much an affirmative expression of a political opinion as is joining a side, or speaking out for or against a side." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1984).[13]

The immigration judge also credited Elias-Zacarias' uncontradicted testimony as to the objective facts that the guerrillas came to his home armed and wearing masks and that they left him with a warning to "think it [over] well." The government concedes that Elias-Zacarias has a well-founded fear of persecution. Pet. Br. at 12. The government also concedes, as it must, the well-settled proposition that a guerrilla organization can be the agent of persecution. *Id.* at 30.[14]

Elias-Zacarias "affirmatively express[ed] a political opinion" by refusing to join the guerillas; he was threatened; he believes he was threatened for his refusal to join; and he is afraid to return to Guatemala for fear that the threat will be carried out. The record shows that these fears have a reasonable basis. Nothing more is required by the statutory definition.

Elias-Zacarias could reasonably infer that the guerrillas consider his refusal to join them to be an act of

[13] In *Bolanos-Hernandez*, the Ninth Circuit cited a long line of this Court's cases holding that conduct can be an expression of political opinion. *See, e.g., Spence v. Washington*, 418 U.S. 405 (1974) (taping peace symbol on flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (civil rights march); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (arm band to protest Vietnam war); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (assembly in front of State House); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing). *See also Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

[14] *See* Immigration and Naturalization Service, Office of the General Counsel, Asylum Branch, *Basic Law Manual: Asylum* 25 (Mar. 1991) (hereinafter *"INS Basic Law Manual"*); *Matter of McMullen*, 17 I. & N. Dec. 542 (BIA 1980), *rev'd on other grounds*, 658 F.2d 1312 (9th Cir. 1981).

political hostility and that they therefore consider him a political enemy. For Elias-Zacarias' fear to be objectively reasonable, there must only be a reasonable possibility that the persecution he fears would indeed be caused by his political opinion. *See Cardoza-Fonseca*, 480 U.S. at 440; *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984). He is not required to show that a political motivation is more likely than not.[15]

Indeed, once Elias-Zacarias presented evidence suggesting that the guerrillas had political motives for persecuting him, the government had the burden of offering evidence to the contrary. It did not undertake that burden here, let alone satisfy it: there is no indication in the record that the guerrillas who threatened Elias-Zacarias had any non-political motives for threatening him. *See Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187, at 8 (decided Apr. 15, 1988) (applicant

[15] Under the Refugee Act of 1980, an applicant must show a "well-founded fear" that persecution was or would be on account of one of the five grounds; the Act does not require the applicant to establish that a particular ground was "more likely than not" the cause of persecution. *See* Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 12-13, ¶ 42 (Sept. 1979) (hereinafter cited as "U.N. Handbook"), *quoted in Cardoza-Fonseca*, 480 U.S. at 439 ("the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there"). *See also* Helton, Immigration and Naturalization Service v. Stevic: *Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. Va. L. Rev. 787, 800-808 (1985) (the "well-founded fear" standard requires only that the applicant's fear be genuine and reasonable under the circumstances).

Respondent has lodged a copy of the U.N. Handbook with the Clerk of the Court.

"does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor,'" especially when the government offers only "speculation" as to the persecutor's motives).

In summary, Elias-Zacarias had a political opinion and expressed it by refusing to join the guerrillas; he fears that he will suffer persecution because of that refusal to join if he returns home; and his fear of persecution is well founded. Only by assigning constricted, unintended meanings to the terms of the refugee definition and by adding unreasonable burdens of proof to the showing required of an applicant can one conclude that Elias-Zacarias has not demonstrated his "well-founded fear of persecution on account of . . . political opinion."

B. The Position Advanced by the Government Would Require Applicants To Sustain Impossible Burdens of Proof.

Evidence in the record amply demonstrates that Elias-Zacarias has a well-founded fear of persecution on account of political opinion. Yet, the government pronounces itself unpersuaded: "A guerrilla group may engage in forcible conscription to fill its need for soldiers without any intention to punish its levy for holding incorrect political opinions." Pet. Br. at 27. "That, in fact," declares the government, "is the typical case." *Id.*

Those assertions ignore the fact that the focus of the inquiry directed by the statute is on what Elias-Zacarias *fears*, not on the general nature of forced conscription. They also ignore the fact that what Elias-Zacarias fears most is not that he will be forced to join the guerrillas, but that he will be "take[n] and kill[ed]." Moreover, those knowing assertions of the government about how guerrillas behave (and why) have no basis in the record of this case. They are pure argument. And yet the government relies on such *ipse dixit* to demand that an applicant for asylum who has fled forced recruitment and retaliation by a guerrilla army must submit proof that his is not the assumed "typical case." To satisfy the government's standard, the applicant would be required to prove, not only his own political opinion, and not only that he has a subjective fear of persecution grounded in objective fact, but also exactly *why* his persecutors would act against him.

If this Court were to accept the government's position, it would be impossible, as a practical matter, for many if not most refugees ever to establish their eligibility for asylum, because they could not produce direct evidence of their persecutors' motives. For example, in Elias-Zacarias' situation, where would one begin? Whose motives should be proven, those of the two masked men carrying machine guns? or those of their officers? or those of the founders of the guerrilla movement? How could Elias-Zacarias—who did not know the names or addresses of his persecutors—obtain evidence of their subjective motivations? The answers to questions like these are particularly elusive because it is the very nature of guerrilla organizations (unlike governments) to leave little concrete evidence of their activities.[16]

Congress did not intend to compel applicants for asylum to meet impossible burdens of proof. In *Cardoza-Fonseca*, after examining the phrase "well-founded fear of persecution" in the refugee definition of the Refugee

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[16] The State Department has noted the difficulty in determining a motive behind much of the violence in Guatemala, stating in one country report on human rights that, "although . . . deaths might have been politically motivated, (in many cases) there is no evidence which definitively links the deaths to the victim's political or professional activities." U.S. Department of State, *Country Reports on Human Rights Practices for 1985*, 99th Cong., 2d Sess. 544 (Joint Comm. Print 1986). *See also* U.S. Department of State, *Country Reports on Human Rights Practices for 1986*, 100th Cong., 1st Sess. 511 (Joint Comm. Print 1987); U.S. Department of State, *Country Reports on Human Rights Practices for 1983*, 98th Cong., 2d Sess. 580 (Joint Comm. Print 1984).

Act of 1980, the Court expressly rejected the government's proposition that an applicant for asylum was required to show that it was "more likely than not" that she would be persecuted on account of political opinion. The Court concluded that a less stringent reading of the definition was "more in keeping with Congress' intent." 480 U.S. at 445. Under this standard, "if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to 'specific facts that give rise to an inference that the applicant has been or has good reason to fear that he or she will be singled out for persecution on one of the specified grounds.'" *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir.) (quoting *Carvajal-Munoz*, 743 F.2d at 574), *aff'd*, 480 U.S. 421 (1987).[17]

In addition, as the Court also recognized in *Cardoza-Fonseca*, "one of Congress' primary purposes was to bring United States refugee law into conformity with the 1967 United Nations Protocol Relating to the Status of Refugees."[18] The Protocol, as interpreted by authoritative international sources, establishes a reasonable burden of proof that takes account of the evidence-gathering difficulties faced by refugees who have fled their homelands in fear of persecution. According to the U.N. Handbook,[19] "it is hardly possible for a refugee to 'prove'

[17] The BIA itself has stated, "we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution . . . . The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

[18] 480 U.S. at 436, referring to United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. *See also* S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 18 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); 126 Cong. Rec. 4500 (1980) (statement of Rep. Holtzman, co-sponsor of House bill).

[19] As this Court recognized in *Cardoza-Fonseca*, the U.N. Handbook is a source of "significant guidance" in interpreting the 1967

every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized."[20]

Thus, once it has been estabiished that the applicant genuinely fears persecution in response to an expression of his or her political beliefs, direct proof of the persecutors' subjective motivations is not required:

> While the [Protocol's] definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion". . . . It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.[21]

The IRO Constitution, G.A. Res. 62, U.N. Doc. A/1641 Add. 1 (1947), which is the precursor of the 1951 Convention Relating to the Status of Refugees and the 1967 U.N. Protocol, took a similar approach to the burden an applicant must bear. The IRO Manual for Eligibility Officers elaborated:

> [F]ear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or

U.N. Protocol. The Handbook "has been widely considered useful in giving content to the obligations that the Protocol establishes." 480 U.S. at 439 n.22.

[20] U.N. Handbook, *supra* note 15, at 48, ¶ 203.

[21] *Id.* at 19-20, ¶ 81. *See id.* at 16, ¶ 61 and at 20, ¶ 83 (if an applicant faces persecution from his government for illegal departure or unauthorized stay abroad, "his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated [in the refugee definition]").

> to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling, the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible.[22]

The record of this case fits these long-standing United Nations formulations exactly: Elias-Zacarias' political opinion led to his behavior, rendering it plausible that the guerrillas will retaliate against him because of his opinion.

Acceptance of the government's constricted interpretation would also contravene the intent of Congress in enacting the Refugee Act of 1980 to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law."[23] Congress adopted the statutory definition of "refugee" in 8 U.S.C. § 1101(a)(42)(A) (1988) with a broad, humanitarian purpose, expanding the category of eligible persons by eliminating geographical and ideological restrictions,[24] while developing other statutory

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[22] International Refugee Organization, *Manual for Eligibility Officers* 24, ch. IV, para. 19 (1950). *See also* Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333, 340 (1984).

[23] H.R. Rep. No. 608, *supra* note 18, at 17-18. Notably, the government's position is "inconsistent with the refugee definition." Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent at 19. Under the UNHCR definition, "it is the fact of persecution, not any specific intent to persecute, that one reasonably fears, and from which the Refugee Act seeks to provide protection." *Id.*

[24] *See INS v. Stevic*, 467 U.S. 407, 422 (1984). On this point, the government's brief mischaracterizes the legislative history. *Compare*

mechanisms to control the number of refugees who could enter the United States. Notably, Congress adopted numerical limits for refugees located overseas who sought admission to this country, but chose not to impose any such limits on persons within the refugee definition who sought asylum at or within the borders of the United States.[25] As explained in part II.B *infra*, Congress intended the agency to apply the refugee definition in a geographically and ideologically neutral fashion, without regard to the potential number of applicants.[26]

Nor should the Court give weight to the government's focus on the "displaced persons" language in the Senate bill. Pet. Br. at 17-20. Congress' ultimate rejection of that language has no relevance to Elias-Zacarias' situation. The term "displaced persons" would have applied to persons who did not fall within the definition of refugee in the 1967 U.N. Protocol because they were located within their own countries and because they were the victims of generalized civil strife rather than targeted persecution.[27]

Pet. Br. at 17, 20 (Congress wanted to prevent expansion of "the numbers of refugees eligible to come to the United States" and believed that its definition of refugee would achieve this goal) *with* H.R. Rep. No. 608, *supra* note 18, at 10 ("The Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group of refugees comes within the definition will not guarantee resettlement within the United States.").

[25] *Compare* 8 U.S.C. § 1157 (1988) *with id.* § 1158(a).

[26] Within the limits imposed by the statute, which are not at issue in this case, the Attorney General has the discretion to deny asylum to persons who qualify as "refugees" under the statutory definition. *See, e.g., INS v. Stevic*, 467 U.S. at 423 n.18.

[27] *See* S. Rep. No. 256, 96th Cong., 1st Sess. 20 (1979) ("person who ha[s] been displaced by military or civil disturbance or up-

In contrast, Elias-Zacarias is a refugee within the meaning of the 1967 U.N. Protocol because he is threatened with persecution and it is plausible that this persecution would be caused by his political opinion. Moreover, even though the Senate language was not adopted, the House language that was ultimately added to the statutory definition of refugee provides for admission of certain persons who would not qualify as refugees under the 1967 U.N. Protocol.[28] Thus, rather than showing that Congress intended a constricted interpretation of the refugee definition as a whole, the legislative history on this point shows that Congress was willing to extend the definition even beyond the requirements of the Protocol.

Petitioner further contends that persons fleeing forced recruitment by guerrillas should not be recognized as refugees because it would be logically necessary to provide the same treatment to persons seeking to avoid compulsory military service for their own governments. Pet. Br. at 22. This is a *non sequitur*. Persons in the latter category are not generally recognized as refugees, *see* U.N. Handbook, *supra* note 15, at 39-40, ¶ 167, because the international community recognizes the right of governments to require their own citizens to perform military service. However, guerrilla organizations have no legitimate claim of authority to conscript unwilling individuals into their armed forces.[29] In the absence of a

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rooted because of arbitrary detention, and who is unable to return to his usual place of abode").

[28] 126 Cong. Rec. 4499-4500 (1980) (statement of Rep. Holtzman); 126 Cong. Rec. 3756-57 (1980) (statement of Sen. Kennedy).

[29] The petitioner acknowledges that, unlike governments, "'non-governmental groups lack legitimate authority to conscript persons into their armies.'" Pet. Br. at 22 (quoting Pet. App. at 12a), but claims that this is not a valid distinction because "[g]overnments throughout history have ordered persecution in punctilious conformity with domestic law." This argument is fallacious. Recognition that draft-dodgers are generally not refugees depends on the recognition under *international* law (not *domestic* law) of the right of governments to require their citizens to perform military service. *See* American Convention on Human Rights, art. 6, para. 3, O.A.S. Treaty Ser. No. 36 (OEA/Ser. L. L/V/II. 23 doc. 21 ver. 6 (1979)); *Conscientious Objection to Military Service*, U.N. Doc. E/CN.4/Sub. 2/1983/30/Rev. 1, at 5, 14 (1985).

The BIA itself has distinguished persecution by armies without a legitimate claim of authority from prosecution by a legitimate nation-state for draft dodging. *See Matter of A.G.*, 19 I. & N. Dec. 502 (BIA 1987), *aff'd*, *M.A. v. U.S. INS*, 899 F.2d 304 (4th Cir. 1990) (en banc); *Matter of Izatula*, Int. Dec. 3127, 1990 BIA LEXIS 2 (BIA Feb. 6, 1990).

legally recognized right of recruitment, non-governmental organizations engage in kidnapping, torture, extrajudicial killings, and other forms of coercion to achieve their ends. Thus, customary international law regarding governmental conscription sheds no light on Congress' intent with respect to persons fleeing forced recritment by guerrilla organizations.

In conclusion, the construction of the statute proposed by the government imposes a virtually impossible burden on applicants for asylum which is "contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In addition, even though Congress intended to conform the refugee definition to the 1967 U.N. Protocol, the government's narrow interpretation disregards the guiding principles in the U.N. Handbook. Finally, the policy reasons adduced by the government for excluding Elias-Zacarias from the statutory definition of refugee formed no part of the congressional purpose. The government's position is "manifestly contrary to the statute." *Id.* at 844.

II. THE GOVERNMENT'S INTERPRETATION OF THE STATUTORY LANGUAGE IS NOT ENTITLED TO DEFERENCE.

Petitioner urges deference to the BIA's interpretation of the refugee definition in the Refugee Act of 1980, citing several BIA decisions stating that forcible recruitment by guerrilla organizations does not constitute persecution on account of political opinion. But the factual premise for that argument—that the BIA's conclusion "has been applied consistently" [30]—is demonstrably incorrect.

In fact, the position urged by petitioner in this case is flatly inconsistent with a number of prior BIA decisions regarding the motivations of persecutors and the political implications of resisting forcible recruitment. If the BIA had applied the principles enunciated in its own rulings to Elias-Zacarias, it would necessarily have concluded that he is a refugee within the statutory definition. The BIA's inconsistent interpretation of the meaning of "persecution on account of political opinion" thus deprives it of the deference ordinarily given to agency determinations. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 446-47 n.30; *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858-59 n.25 (1975); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).[31]

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[30] Pet. Br. at 24.

[31] The government's inconsistent approach to forced recruitment cases cannot be justified as the agency's exercise of discretion in the area of its delegated policy-making authority. It is well established that, unlike the Attorney General's discretionary authority over the ultimate grant of asylum, the determination of refugee status does not involve the exercise of discretion by the agency. *See Sagermark v. INS*, 767 F.2d 645, 649 (9th Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). *See also Cardoza-Fonseca*, 480 U.S. at 428 n.5; *INS v. Stevic*, 467 U.S. at 423 n.18.

A. The BIA Has Not Consistently Required Applicants To Prove the Specific Motivations of Their Persecutors.

In two cases reversing denials of asylum to individuals from Somalia who claimed they were subject to persecution because of their membership in a particular social group, the BIA stated:

> We note that an applicant *does not bear the unreasonable burden of establishing the exact motivation of a "persecutor"* where different reasons for actions are possible. Rather, an applicant bears the burden of establishing facts from which a reasonable person would fear that the danger arises on account of race, religion, nationality, membership in a particular social group, or political opinion.

Matter of Said-Barre, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988) (emphasis added); *accord Matter of Ahmed*, BIA unpublished dec. No. A24 798 181 (decided June 10, 1988).[32] Application of this test is particularly appropriate in cases where, as in the instant case, the INS has presented no evidence regarding the persecutor's motives. *See Matter of Ahmed*, at 8.

The BIA has followed the "reasonable person" rule in other cases (not cited in the government's brief) and has not required applicants to bear the unreasonable burden of establishing the precise motives of the alleged persecutors. For example, in *Matter of Betanco-Rios*, BIA unpublished dec. No. A28 635 394, at 3 (decided Mar. 31, 1988), the BIA took into account the nature of the threats against the refugee's family if he did not enlist in the Sandinista army and the actions taken by the Sandinistas after he deserted. It held that "a person in the respondent's position would reasonably conclude that these actions arose because of his political opinion and

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[32] The BIA has also stated this general rule in a published decision which nevertheless rejected the applicant's claim. *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988).

those of his family, rather than as 'simple' punishment for civilian or military offenses." *Id.* Similarly, in *Matter of Gutierrez-Cano*, BIA unpublished dec. No. A26 677 072, at 4 (decided Aug. 3, 1987), the BIA relied on a variety of factors, including the individual's own previous political activities, his refusal "because of his political views" to join a pro-Sandinista organization, and persecution of his family members, in order to find that "a reasonable person in the respondent's position would fear persecution in Nicaragua" *either* for membership in a social group or for anti-Sandinista political opinion.

In the cases on which the government relies here, however, the BIA has used a strikingly different approach. These cases would require applicants to meet a standard much more stringent than the "reasonable person" standard. The BIA has not explained, and the government's brief has not even acknowledged, the obvious inconsistency.

B. The BIA Has Inferred the "Political Opinion" Element Without State of Mind Proof in Cases Involving Forced Recruitment by Groups Other Than Legitimate Governments.

The government's position is also markedly inconsistent with a number of cases decided during the 1980s—both before and after Elias-Zacarias' BIA appeal—in which the BIA held that forced military recruitment was "persecution on account of political opinion." The government's claim of consistency is based on statements in several BIA decisions regarding forced recruitment by guerrillas,[33] but these cases cannot be reconciled with contemporaneously decided BIA cases that are not cited in the government's brief.

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[33] *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988); *Matter of Vigil*, 19 I. & N. Dec. 572, 577 (BIA 1988); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989).

In *Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982), the first and most important of these cases—one of the few asylum cases published by the BIA as a precedent[34]—the Board held that an Afghani who refused to fight against his compatriots had established, on those grounds alone, a well-founded fear of persecution based on political opinion. The applicant's "immediate reason" for fleeing Afghanistan was his refusal to join the Soviet-controlled Afgan army that was battling the Mujahidin resistance movement for control of the country. Reversing the Immigration Judge, the BIA explained:

> The [State Department's 1981 country report on human rights in Afghanistan] emphasizes that due to mass desertion by Afghan soldiers who refuse to fight under Soviet command against their compatriots, the army resorts to dragooning and forcibly impressing into its forces men and boys as replacements. This clearly differs from persecution claims by aliens who merely seek to avoid military service in their country. *See Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969). . . . Consequently, we conclude that the applicant has established a well-founded fear of persecution despite the immigration judge's conclusion to the contrary.[35]

Salim did not adduce specific proof that the Soviet-controlled Afghan army sought to "punish" him "for holding incorrect political opinions." *Cf.* Pet. Br. at 27. Indeed, the State Department report cited by the BIA made it clear that the Afghan army was only engaging in forcible conscription to fill its need for soldiers. Yet, the BIA had no difficulty recognizing Salim as a refugee

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[34] *See* T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 112 n.12 (int. 2d ed. 1991); Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 255 & n.8 (1990).

[35] 18 I. & N. Dec. at 313.

who had fled persecution on account of political opinion. The BIA routinely applied its holding in *Matter of Salim* to cases involving Afghanis who had fled their country to avoid serving in the military before the Soviet withdrawal from Afghanistan.[36]

The BIA has reaffirmed on several occasions that its holding in *Matter of Salim* was based on the applicant's refusal to serve in an army other than the legitimate military service of his own country, not on any evidence of that army's specific intent to punish the applicant for his political opinions. For example, in *Matter of A.G.*, the BIA wrote:

> [T]he government of El Salvador has the same right as other governments to require military service and to enforce that requirement with reasonable penalties. The case of the claimant in *Matter of Salim* . . . is distinguishable from that of the respondent because the former was refusing to serve, not in an army controlled by his own government, but in one which was "under Soviet command." [37]

Similarly, in *Matter of Arghwan*, the BIA reiterated that: "The fact that the Afghan government is controlled by a foreign power distinguishes the applicant's persecution claim from persecution claims by aliens who

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[36] *See, e.g., Matter of Vohra*, BIA unpublished dec. No. A27 504 113 (decided Feb. 25, 1988) (granting asylum to applicant who "appears to have fled Afghanistan because he did not want to be conscripted by the Afghan military and because he did not want to fight against the mujahedin"); *Matter of Noory*, BIA unpublished dec. No. A24 081 415 (decided Dec. 11, 1985) (granting asylum to applicant whose "only fear upon his return to Afghanistan is that he would have to serve in the Soviet-controlled military forces"); *Matter of Momen*, BIA unpublished dec. No. A27 026 208 (decided Nov. 6, 1985) (granting withholding of deportation "based solely on the applicant's assertion that he will be conscripted into the Afghan Army if returned to that country").

[37] 19 I. & N. Dec. at 507 (citation omitted).

merely seek to avoid military service in their country." [38] Like the Soviet-controlled army in Afghanistan, the Guatemalan guerrillas have no legitimate basis for compelling individuals to serve their cause.[39]

The BIA has never explained why its Guatemalan and Salvadoran decisions do not apply the same reasoning and reach the same results as the prior and contemporaneous Afghan decisions.[40] To the extent that the difference is based on geography or nationality, the inconsistency contravenes congressional intent. As this Court has recognized, one of Congress' primary purposes when it enacted the statutory definition of "refugee" in 1980 was to eliminate the geographical and ideological distinctions that had existed under prior law. *See INS v. Stevic*, 467 U.S. at 422. Testimony at hearings, floor statements, committee reports, the conference report, and the Presi-

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[38] *Matter of Arghwan*, BIA unpublished dec. No. A26 805 885, at 4 (decided Nov. 19, 1987). *Accord Matter of Re*, BIA unpublished dec. No. A29 773 836 (decided Dec. 28, 1990).

[39] The BIA also has taken inconsistent approaches with respect to its "presumption" that there is a legitimate basis for punishing those who refuse to serve in forces other than those mustered by their own government. *Compare Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 517 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989) (the right of the Salvadoran guerrillas to engage in forced conscription is "virtually identical" to the Salvadoran army's "right to establish rules of military conduct and to punish those who violate them") *with Matter of Izatula*, Int. Dec. 3127, 1990 BIA LEXIS 2 (BIA Feb. 6, 1990) (applicant had established a well-founded fear of persecution "because there [was] no basis in the record to conclude that any punishment imposed by the Soviet-controlled Afghan government would be a legitimate exercise of sovereign authority").

[40] In *Matter of Canas*, 19 I. & N. Dec. 697, 709 n.11 (BIA 1988), *rev'd*, 902 F.2d 717 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991) (No. 90-1246), the BIA distinguishes *Matter of Salim*. But, unlike Salim or Elias-Zacarias, Canas was objecting to military service for his own government. *Id.* at 709 n.11.

dent's signing statement all stressed the importance of a nondiscriminatory refugee policy.[41] Congress also intended to conform U.S. law to the requirements of the 1967 U.N. Protocol, which incorporates the provision in the 1951 U.N. Convention that requires signatories to "apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." [42]

III. IF THE COURT ENUNCIATES A NEW EVIDENTIARY STANDARD, THE CASE MUST BE REMANDED FOR FURTHER FACTUAL DEVELOPMENT.

For the reasons discussed above, this Court should reject the statutory interpretation advanced by the government and affirm the judgment of the court of appeals. But even if the Court adopts the government's position regarding the definition of "refugee," it cannot properly sustain the BIA's determination in this case. Instead, the case should be remanded to the court of appeals with instructions to remand to the agency for further development of the record.

One of the cardinal principles of administrative law is that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis

[41] *See, e.g.*, S. Rep. No. 256, *supra* note 27, at 4; H.R. Rep. No. 608, *supra* note 8, at 1, 9; *see generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 46, 50, 56, 60 (1981). *See also* Stipulated Settlement Agreement, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (INS stipulation that its regulations do not permit ideological and geographical distinctions with respect to asylum applicants).

[42] United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. III, 189 U.N.T.S. 152.

added). Thus, an agency's order "must be upheld, if at all, 'on the same basis articulated in the order by the agency itself' "—not on a basis subsequently asserted by counsel during the process of judicial review. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)).[43]

In this case the decisions by both the immigration judge and the BIA rested on the conclusion that Elias-Zacarias had failed to show that he had been threatened with harm. It was on that basis that the agency argued the case at the deportation hearing and, in the first instance, before the court of appeals.[44] The court of appeals held that the BIA's factual findings on the lack of a threat by the guerrillas were not supported by substantial evidence. Pet. App. at 8a, 16a-17a. Petitioner chose not to seek certiorari on that holding, and indeed the government now concedes that the issue of whether Elias-Zacarias has a "well-founded fear of persecution" is not before this Court. Pet. Br. at 12. Therefore, the BIA's decision cannot be upheld on the basis articulated by the agency.[45]

[43] *See also Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 162-63 n.4 (D.C. Cir. 1986) (en banc) (Scalia, J.) (deference is not due to counsel's litigation position because agency has not taken a "clear and consistent" view), *cert. denied*, 479 U.S. 1063 (1987); *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 789-90 (2d Cir.) (Learned Hand, J.) (refusing to give deference to counsel's litigation position on grounds of agency inconsistency), *aff'd*, 328 U.S. 275 (1946).

[44] *Compare* Pet. App. at 13a (INS position at deportation hearing) *and* Brief for Respondent at 11, 17, 28, *with* Respondent's Petition for Rehearing With Suggestion for Rehearing En Banc at 1, 4, 9, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

[45] Sup. Ct. Rule 24.1(a). In this case, there are no exceptional circumstances that would warrant this Court's consideration of an issue not presented on certiorari. *See Berkemer v. McCarty*, 468

Nor would it be appropriate for this Court to sustain the agency's decision based on the government's interpretation of "persecution on account of . . . political opinion" without giving Elias-Zacarias a further opportunity to develop the factual record. In presenting his case to the immigration judge and the BIA, Elias-Zacarias reasonably relied on Ninth Circuit precedents. Under those cases, he was not required to prove the motivations of his persecutors.[46] An administrative agency is obligated to apply circuit court precedent in any case that originates within that circuit or is otherwise within the circuit's jurisdiction.[47] The BIA's own case law recognizes its obligation to follow controlling circuit precedent, even if the BIA disagrees with the court's position on the merits. In fact, the BIA has frequently done so in recent

U.S. 420, 443 n.38 (1984); *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976).

[46] *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984).

[47] *See, e.g., NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). The INS' own manual for asylum adjudication requires immigration judges "to follow the precedent decisions of the courts of appeals only with respect to cases arising within the issuing court's territorial jurisdiction." *INS Basic Law Manual, supra* note 14, at 9.

The sole exception to this rule is when the agency has a "good faith" intention to appeal the circuit court's ruling to the Supreme Court, and expressly rejects the circuit court's controverted decision within the context of the agency decision. *See NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d at 75; *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1067 (7th Cir. 1988). The BIA decision does not reveal that it was taking advantage of this exception in this case. *See* Pet. App. at 27a-33a.

cases in the Ninth Circuit,[48] including cases involving forced recruitment by Central American guerrillas decided both before and after Elias-Zacarias' BIA appeal.[49] Under the circumstances, a remand for further fact-finding would be in keeping with this Court's established practice in cases in which it adopts a new interpretation of a statute. *See, e.g., Saint Francis College v. Al-khazraji*, 481 U.S. 604, 607 (1987); *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 534 (1945).[50]

On remand, Elias-Zacarias would submit evidence that the Guatemalan guerrillas kill people in retaliation for their refusal to join the guerrilla movement. In this regard, the State Department's country reports on human rights and newspaper articles have documented that the Guatemalan guerrillas forcibly recruit rural villagers and use extreme violence against those who oppose their revolutionary movement.[51]

[48] *See, e.g., Matter of Ratnam*, BIA unpublished dec. No. A28 532 774 (decided June 12, 1990); *Matter of Ortega-Moran*, BIA unpublished dec. No. A24 348 263 (decided Apr. 9, 1990); *Matter of J-S*, BIA unpublished dec. No. A27 091 255 (decided Aug. 3, 1989); *Matter of Anselmo*, Int. Dec. 3105, 1989 BIA LEXIS 11 (BIA May 11, 1989); *Matter of Herrera*, 18 I. & N. Dec. 4 (BIA 1981); *Matter of Bowe*, 17 I. & N. Dec. 488, 489-90 (BIA 1980, 1981); *Matter of Patel*, 17 I. & N. Dec. 597, 600-01 (BIA 1980); *Matter of Bonnette*, 17 I. & N. Dec. 587, 588 (BIA 1980); *Matter of Kondo*, 17 I. & N. Dec. 330 (BIA 1980).

[49] *See Matter of Orellana-Marquez*, BIA unpublished dec. No. A26 307 726 (decided Mar. 30, 1990); *Matter of Galdamez-Ayala*, BIA unpublished dec. No. A23 696 985 (decided June 9, 1988); *cf. Matter of Cordova-Lima*, BIA unpublished dec. No. A23 699 315 (decided Aug. 26, 1988) (deserter from guerrillas).

[50] A remand would also create a fully developed record on which to evaluate the reasonableness of the burden of proof the government seeks to allocate to applicants like Elias-Zacarias.

[51] The BIA regularly admits into evidence newspaper articles, documentary testimony of human rights groups, and State Department reports when assessing claims of well-founded fear of persecution on

In the Country Reports on Human Rights Practices for 1988, the State Department reported that leftist guerrillas in Guatemala "known to be looking for recruits" were allegedly responsible for the disappearance of eight men.[52] Similarly, in a report released in February 1990, the State Department wrote, *inter alia*: "[In 1989,] the communist guerrillas increased their campaign of violence, which included destruction of public and private property, robbery, *forced recruitment and labor*, murder, and indiscriminate use of land mines."[53] Two Guatemalan refugees repatriated from the United States were among the victims of extrajudicial killings in rural areas.[54] Last year's State Department report also states that forced recruitment and violence continue in Guatemala.[55]

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account of political opinion. *See e.g., Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 812-13 (BIA 1988) (Board admits into evidence newspaper articles, congressional testimony, and reports by human rights groups); *Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988) (BIA admits Amnesty International materials, State Department country reports, and newspaper articles); *Matter of Exame*, 18 I. & N. Dec. 303, 304-05 (BIA 1982) (BIA finds that immigration judge improperly excluded reports by human rights groups and State Department country reports); *Matter of Diaz-Morales*, BIA unpublished dec. No. A24 854 030 (decided Aug. 14, 1987) (Board admits into evidence newspaper articles, congressional testimony, reports by human rights groups, and expert affidavits). *See also Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975) (within the Ninth Circuit, the test for admissibility of hearsay evidence in administrative proceedings is "fundamental fairness and probativeness").

[52] *See* U.S. Department of State, *Country Reports on Human Rights Practices for 1988*, 101st Cong., 1st Sess. 579 (Joint Comm. Print 1989).

[53] U.S. Department of State, *Country Reports on Human Rights Practices for 1989*, 101st Cong., 2d Sess. 597 (Joint Comm. Print 1990) (emphasis added).

[54] *Id.* at 599.

[55] *See* U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. 632 (Joint Comm. Print 1991).

Newspaper reports on conditions in Guatemala confirm that the guerrillas will use drastic measures against individuals, like Elias-Zacarias and his family, whom they perceive to be their political enemies. As early as 1982, an American missionary reported that forced recruitment by the guerrillas was causing peasants to flee the Guatemalan highlands, and that the guerrillas had killed a peasant who refused to join them.[56] In 1988, the guerrillas abducted 40 peasants in the Chimaltenango Department as part of a recruitment campaign.[57] Finally, on July 9, 1991, the Christian Science Monitor reported that, during the last six months, 587 people have been killed and 118 have disappeared in Guatemala.[58] Most observers blame this political violence on the leftist guerrillas, who are said to have accelerated their violence against their opponents in an effort to obtain negotiating leverage in the ongoing peace talks.[59]

Other evidence could be presented to the immigration judge on remand. Counsel for Elias-Zacarias has located tape recordings of interviews with an Indian from rural Guatemala, two former guerrillas, and an Indian administrator.[60] Therein, one rural villager recounted: "[The guerrillas] said, that . . . if we don't want to participate with them, then they will kill us. That is why we decided to leave one-by-one and give ourselves up to the Army."[61] A former guerrilla pro-

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[56] *See* N.Y. Times, Oct. 10, 1982, § A, at 1, col. 1.

[57] Foreign Broadcast Information Service, *Latin American/Daily Report*, Oct. 25, 1988, at 19.

[58] The Christian Science Monitor, July 9, 1991, at 1, col. 1.

[59] *Id.*

[60] These interviews were conducted in 1982 by Louis S. Segesvary, a former Visiting Foreign Affairs Fellow at the Georgetown Center for Strategic and International Affairs.

[61] Interivew with inhabitant of Playa Grande, at 3.

vided a similar description of the recruitment process: "[the guerrillas] say that those who do not want to collaborate (with the guerrillas) are obviously with the Army and they kill him." [62] Expert testimony also could be presented detailing conditions in Guatemala, the recruitment practices of the guerrillas, and their motivations for taking reprisals against those who refuse to join. Finally, Elias-Zacarias could testify as to his personal knowledge of the guerrillas' recruitment practices, crucial testimony that was cut off by the immigration judge at Elias-Zacarias' original hearing on the grounds that it was speculative.[63]

Accordingly, if this Court enunciates a new rule regarding persecution on account of political opinion, it should afford Elias-Zacarias an opportunity to present such evidence to an immigration judge in order to sustain his claim under that newly-articulated standard. *See Kovac v. INS*, 407 F.2d 102, 107-108 (9th Cir. 1969).

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[62] Interview with "Commander Anita," Female Ex-Guerrilla, at 3-4. Another guerrilla confirmed that villagers who chose not to collaborate with the guerrillas would be killed. Interview with Captured Male Guerrilla, at 2.

[63] *See* Opp. Cert. App. at 6a.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed or, alternatively, the case should be remanded with instructions that Elias-Zacarias be permitted to submit additional evidence that he has a "well-founded fear of persecution on account . . . of political opinion."

Respectfully submitted,

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